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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

No. 562.

Term, 19

HARRY J. ALKER, JR., and MAMIE DuBAN, Individually, and as Executrix of the Estate of ALFRED A. DuBan, Deceased,
Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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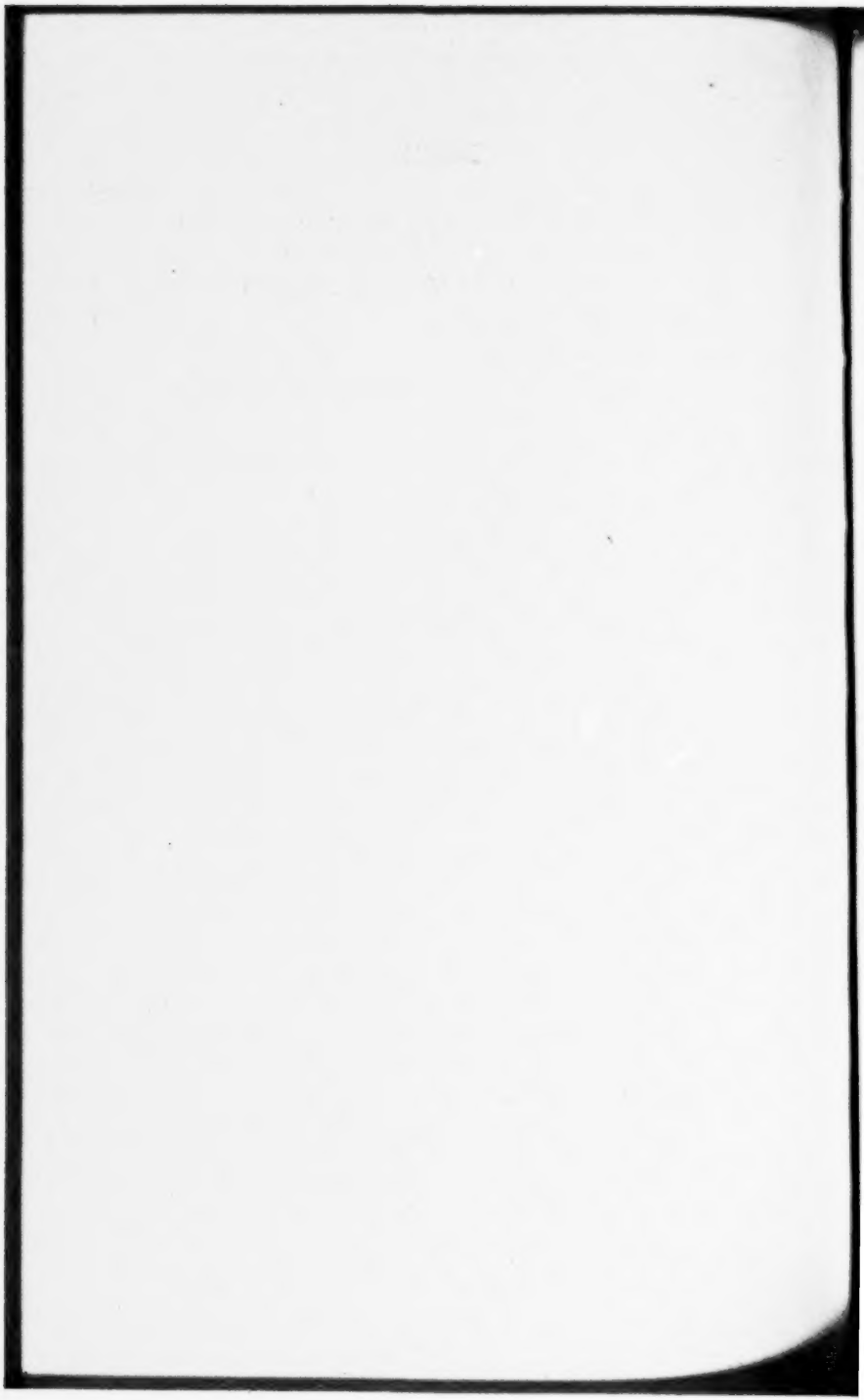

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HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE FRED M. VINSON, *Chief Justice, and the Associate Justices of the Supreme Court of the United States:*

The petitioners, Harry J. Alker, Jr., and Mamie DuBan, individually, and as Executrix of the Estate of Alfred A. DuBan, deceased, respectfully petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit, and respectfully show:

SUMMARY STATEMENT OF MATTERS INVOLVED.

This is an equitable action by the Federal Deposit Insurance Corporation to recover from the petitioners an alleged deficiency on a certain demand note dated December 11, 1936, in the sum of $564,367.51, after selling to itself most of the collateral with the note (which note was in renewal of two prior demand notes dated May 26, 1931, in the sum of $242,150 and $350,000); there was an oral agreement

deferring the time of payment of the note but the Court found against the petitioners because of indefiniteness as to time of deferment—the Trial Court having refused to receive petitioners' evidence which would have fixed such time. *The Trial Court specifically, however, found there was no fraud.* Judgment was entered against the petitioners. A motion for new trial was made and refused. An appeal, assigning various errors of the Chancellor, was taken to the U. S. Circuit Court, which (without going into the errors assigned), affirmed the judgment as a matter of law, holding the case was controlled by the decision in *D'Oench, Duhme & Co., Inc., v. Federal Deposit Insurance Corporation,* 315 U. S. 447 (*which was a gross fraud case*), and section 12 B (s) of the Federal Reserve Act, 12 U. S. C. A., section 264 (s). A petition for certiorari was refused by this Court, 334 U. S. 827.

The motion for new trial in the lower Court was thereafter renewed because of after-discovered evidence; and then an application was filed to the then Circuit Court of Appeals for permission on the part of the District Court to hear the same. The application was refused. An application for reconsideration of the Court's action was then filed and declined. Another petition was then filed for reconsideration of the Court's action, and leave to file the same was denied by the United States Circuit Court on November 15, 1948. No reasons were given for the Court's action.

The basis of the application to the Circuit Court was after-discovered evidence which petitioners contended was sufficient to take this case out of the rule of the *D'Oench, Duhme* decision (*supra*). This evidence consisted of the testimony of one John Pellini, Jr., who was serving in the United States Army and was absent from the country at the time of trial, being in actual combat service from early in 1943 until sometime in 1946. His depositions were taken on his return, and transcribed by the court stenographer, to the effect that he personally knew the loan in 1936 was

extended for another ten years, having been so advised by the bank, that in 1936 a new note was demanded by the Bank Examiner because he thought the old notes were stale, that the original notes were not returned by the bank to the maker Alker until about six weeks after the new note was given to the bank in December, 1936; and that the old notes, when returned, bore the endorsements as to oral agreements as they now appear, as part of the record. This witness had been the office manager for Alker.

The after-discovered evidence further consisted of the deposition of Mr. C. B. Matsinger, a Pennsylvania state bank examiner, who stated that he had examined the closed bank's books for three consecutive years before its closing, he acting in conjunction with the Federal Examiners (all of whom acted for the Federal Deposit Insurance Corporation); that the details of this particular loan were discussed on each occasion with the bank officials, as well as the large amount of insurance carried by the borrower in favor of the bank, and the assignment to the bank of the large fees due the borrower (a lawyer), which fees were gradually coming in. He testified further that the bank officials advised the Examiners of the existing agreement of deferment as to the loan. This happened in each of said three years prior to the closing of the bank. Attention is called to the fact that none of these depositions have been made a part of the certified record of the proceedings before the Circuit Court although they were before the Circuit Court. Whether the Circuit Court had these depositions before it, when considering the application, although they were filed with it, is not clear from either the record or the opinion of the Circuit Court.

The after-discovered evidence also consisted of a public announcement that the Federal Deposit Insurance Corporation had acted with various National Banks and State Trust Companies in making the loan to the Integrity Trust Company; that the collateral had been held for the benefit of itself and all the said banks and State Trust Companies,

and that the Federal Deposit Insurance Corporation had acted as liquidator for all; and the announcement by Federal Deposit Insurance Corporation that the said banks and State Trust Companies had been paid in full, and it had either repaid itself or had enough in hand to repay itself.

The after-discovered evidence also consisted of the original notes of 1931 which had been found after Pellini's return from abroad, which notes bore a written reference to the agreement. *The Circuit Court in its decisions had ruled that there was no evidence in the records of the bank as to any agreement about this loan. This after-discovered evidence was offered to overcome that, and to establish that the old notes with the notations thereon were at least six weeks in the possession of the bank.* How much longer, appellants could not tell, as they did not have access to the records of the bank.

Testimony was also offered by Mr. Pellini that he knew of his own knowledge that both sets of notes were at the same time in the possession of the bank for at least six weeks and during that period the bank examiner was there and saw both sets.

The original notes themselves were found after the return of John Pellini, Jr., from overseas. One of these notes bore the endorsement:

> "For addtl. collateral and agreement with Mr. Alker
> and A. A. DuBan
> see W. K. H."

and the other bore the endorsement:

> "For addtl. collateral and agreement with Alker
> and A. A. DuBan
> see other note and W. K. H."

(W. K. H. was Walter K. Hardt, the president of the bank). They were presented to the Court, together with an offer of proof that the endorsements had been placed thereon by the bank; that they were there when the new note of 1936 was

prepared and executed by Alker and they were on the notes when the notes about six weeks later were returned to Alker, and that the bank examiner was there during that time.

The Circuit Court's attention was also called to the fact that good business would have required the Federal Deposit Insurance Corporation to take from the maker of the note a declaration of no set-off or defense; that the maker of the note did not know the note had been taken over until the bank had closed; that had the Federal Deposit Insurance Corporation taken such a declaration (which it was its duty to do) there would have been no doubt of its knowledge, and that the Federal Deposit Insurance Corporation therefore should not be permitted to come into a Court of Equity and take advantage of its failure so to do.

The petitioners called the Circuit Court's attention in the refused petition to the fact that the Federal Deposit Insurance Corporation was limited to the powers set forth in the Act creating it and, *if this was a loan, it did not come within the provisions of Section 4 of the Act, as this bank was an open bank and the conditions set forth in that section did not exist.*

The petitioners called the Circuit Court's attention in the refused petition to the fact that legislation was pending in Congress to clarify the Act upon which the Supreme Court based its decision in the *D'Oench, Duhme* case, and that the Act pending provided that the Federal Deposit Insurance Corporation occupied the same position as an insured bank as to obligations owned by the insured bank and acquired by the Federal Deposit Insurance Corporation from it; this legislation making the amendments retroactive to the date of the original enactment creating the Federal Deposit Insurance Corporation.

The reason for asking the Circuit Court to permit the District Court to hear petitioners' motion for a new trial was the District Court felt—(by reason of the fact that the Circuit Court had decided the matter as it did, not because

of any errors made by the Trial Court—but because of the *D'Oench, Duhme* decision and Section 264 (s) of 12 U. S. C. A.) permission should be secured from the Circuit Court for the District Court to hear and decide the motion. It was believed at that time that the permission would be granted perfunctorily. Instead of acting upon the motion perfunctorily the Circuit Court proceeded to try the case itself—this although the Supreme Court of the United States has repeatedly said that such a motion should be heard by the Trial Court and the Circuit Court was not a trial court but a court of appeal.

A petition for reconsideration was denied on November 1, 1948.

The last petition for reconsideration was filed and an order thereon entered on November 15, 1948, denying leave to file the same and giving no reason for the action.

In this action petitioners contend the Court of Appeals abused its discretion and the petitioners were denied due process of law.

This proceeding is one in equity, and the after-discovered evidence and facts offered were sufficient to warrant at least a hearing by the Trial Court thereunder.

Further, petitioners contend that the Court of Appeals by its original decision wrote into the Act of Congress something that does not appear there and never was intended. This will be clarified by the Act now before Congress and any final action should at least have been and be deferred so that Congress should have full opportunity to state its intention.

Furthermore, petitioners contend that the Court of Appeals had no authority in the matter other than to grant the permission to the District Court to reconsider the motion for new trial as it is not a trial court, and there was no fraud in this case either on the Court of Appeals itself or any other person, corporation or court.

Many of the facts are set forth more fully in the prior petitions for certiorari and other petitions and records in

this matter, and for the sake of brevity are not here repeated, but your petitioners beg leave to incorporate them herein by reference.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, C. 229, Section 1, 43 Stat. 938; 28 U. S. C. A. 347 (a).

The order denying leave to file petition for reconsideration of petitioners' motion for leave to the United States District Court to hear the motion for new trial was made on November 15, 1948.

QUESTIONS PRESENTED.

(1) Did not the United States Court of Appeals err in refusing permission to petitioners for leave to file with it the petition for reconsideration of the petitioners' motion for leave to the United States District Court to hear their motion for a new trial?

(2) The facts here being complicated, and substantial after-discovered evidence having been brought to the attention of the United States Court of Appeals, did the United States Court of Appeals err in failing to give specific instructions to the District Court as to its right to hear petitioners' motion for a new trial based on the after-discovered evidence?

(3) Did not the United States Court of Appeals err in thus reaffirming its opinion that the matter was still controlled by *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation,* 315 U. S. 447, without affording the petitioners a full opportunity to present to the Court of original jurisdiction all of the after-discovered evidence, where the after-discovered evidence indicated among other things that the records of the insured bank do disclose that there was an agreement as contended by

the petitioners; the United States Court of Appeals' decision being based on the theory that there was no such evidence?

(4) Did the United States Court of Appeals give proper consideration to or fully comprehend the evidence submitted?

(5) Did not the Federal Deposit Insurance Corporation exceed its authority in making a loan to the Integrity Trust Company, which at the time of the loan was a going concern?

(6) Should the Federal Deposit Insurance Corporation in an equitable action be permitted to take advantage of its own carelessness and failure to use proper business methods where the petitioners were no party to it?

(7) Did not the Court err in failing to consider the fact that to permit the decision to stand opened the way for possible frauds to which a governmental agency would be a party?

(8) Should the Court not have deferred acting until Congress had full opportunity to clarify the Act, knowing as it did that an Act so to do was before the Senate and House Banking Committees?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

(1) The United States Court of Appeals in refusing the application has denied the petitioners due process of law because it has barred the petitioners from a full and complete hearing of all the evidence in an equity proceeding.

(2) The United States Court of Appeals erred in refusing to specifically authorize the Trial Court to hear petitioners' motion for new trial.

(3) The United States Court of Appeals erred in failing to give its reason for its action.

(4) This action of the United States Court of Appeals results in a decision by it remaining undisturbed which is contrary to the statute governing the matter and the decisions of this court. *National Brake & Electric Co. v. Christensen*, 254 U. S. 426; 65 L. E. 341; *Simmons Co. v. Grier Bros Co.* 258 U. S. 82; *Hazel-Atlas Co. v. Hartford Co.*, 323 U. S. 238.

(5) The action of the Circuit Court has the effect of permitting its finding that the after-discovered evidence showed that the agreement on the back of the notes was among the records of the bank for only six days, whereas the evidence offered shows that it was there to the knowledge of the witness for at least six weeks, and during that period the bank examiner was there and saw both sets of notes.

(6) The United States Court of Appeals, because the facts are complicated and the action an equitable one, there being substantial after-discovered evidence of a new character, erred in refusing to reconsider its previous action and erred and exceeded its authority in thus reaffirming its original decision and in not referring the matter back to the District Court for a complete hearing on the after-discovered evidence.

(7) The United States Court of Appeals erred in ignoring the legislation pending to clarify the Act.

(8) The United States Court of Appeals erred in ignoring the fact that the Federal Deposit Insurance Corporation exceeded its authority in making the loan, the Integrity Trust Company being a going concern and the Federal Deposit Insurance Corporation being restricted in making a loan to an open insured trust company by the provisions of the Act creating it.

(9) The United States Court of Appeals erred in ignoring in this equitable proceeding the fact that the Federal Deposit Insurance Corporation had failed to take from the maker of the notes which it took over from the Integrity Trust Company declarations of no set-off or no defense as any good business man would do.

(10) The United States Court of Appeals erred in permitting its decision to stand, as such action opens the way for fraud to be omitted by the present or future Federal Deposit Insurance Corporation in that it will be possible because of such decision for the Federal Deposit Insurance Corporation to enable an open or closed bank secure the benefit of a judgment which the bank itself could not have secured because an agreement as to the note was binding on the bank; it being possible by reason of the decision for the bank to transfer the note to the Federal Deposit Insurance Corporation, who could secure the judgment, and then transfer the judgment back to the closed bank and the poor note holder would be helpless. It is grossly wrong that the way should be left open to make this possible.

PRAYER FOR WRIT.

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court for its review a full and complete transcript of the record and the proceedings of the said United States Circuit Court of Appeals in the case at bar, and entitled on its Docket as No. 8805, Harry J. Alker, Jr., and Mamie DuBan, individually, and as Executrix of the Estate of Alfred A. DuBan, deceased, appellants, v. Federal Deposit Insurance Corporation, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; that the order of the

said Court may be reversed; and that the judgment herein of the United States Court of Appeals for the Third Circuit may be reversed by this Court, and for such further relief as this Court may deem proper.

And your petitioners will ever pray.

HARRY J. ALKER, JR.,

MAMIE DUBAN,
Individually, and as Executrix of the Estate of Alfred A. DuBan, Deceased, Petitioners.

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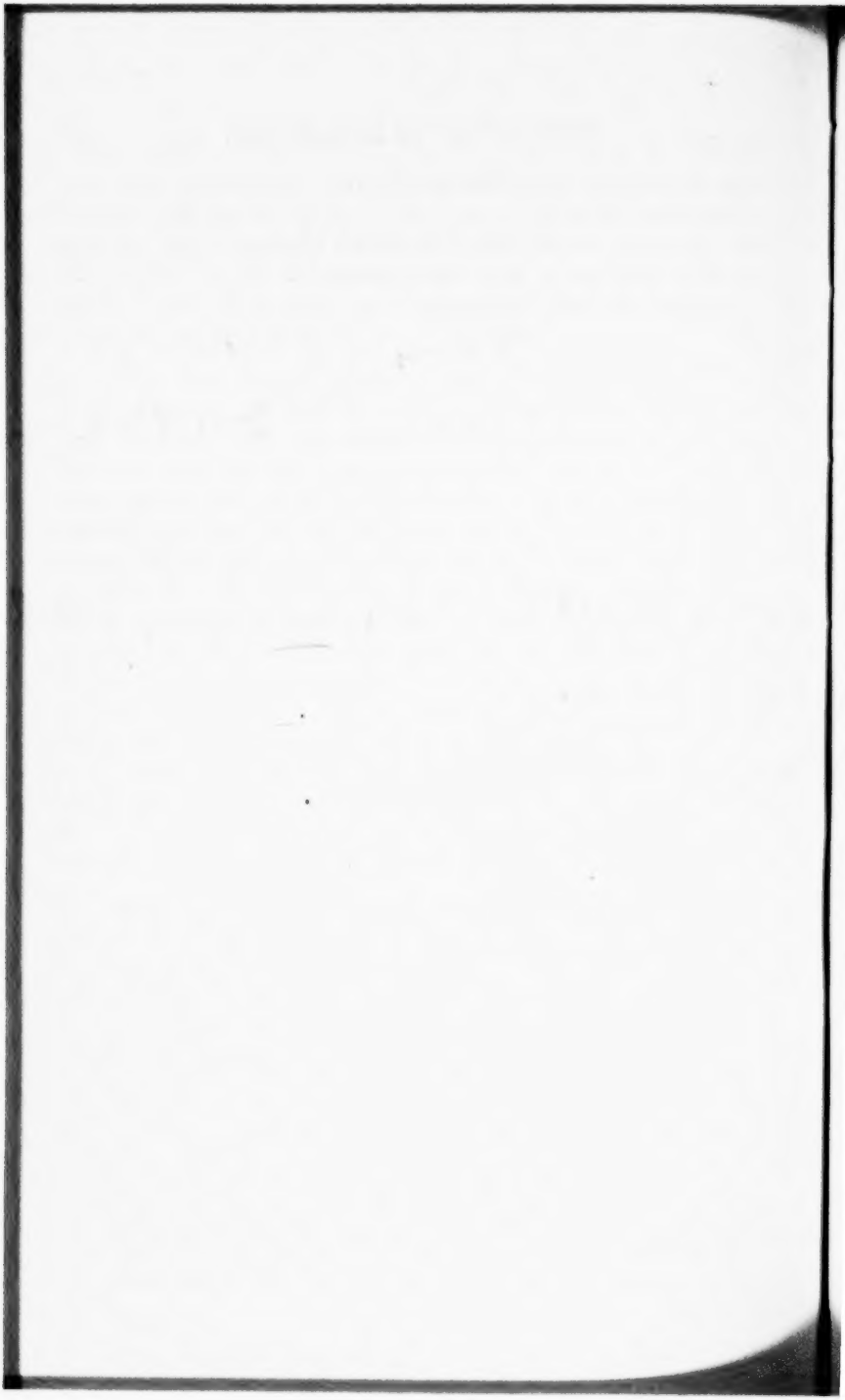

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The original opinion of the United States Court of Appeals for the Third Circuit is reported in 151 Fed. (2d) 907.

The opinion of the District Court is not reported, but is set forth in the Original Record at pages 475a-481a.

The opinion of the United States Court of Appeals on the petition in the nature of a bill of review is reported in 163 Fed. (2d) 123.

The opinion of the United States Court of Appeals on a petition for rehearing of the petition in the nature of a bill of review is reported in 164 Fed. (2d) 469.

The order of the United States Court of Appeals on petitioners' motion for leave to file a petition for rehearing is not reported but is set forth in the Record. This is true of the petitions for reconsideration. The pages of the Record can not be given as the Record has not yet been printed.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Sec. 347 (a).

The date of the order of the Circuit Court of Appeals denying leave to file petition for reconsideration of petitioners' motion for leave to the United States District Court to hear the motion for new trial was November 15, 1948.

STATEMENT OF THE CASE.

In 1929 Harry J. Alker, Jr., borrowed from the Integrity Trust Company about $600,000. giving his demand note therefor, and as security various collateral worth far

in excess of the loan. Later the Trust Company split the loan and had Mr. Alker execute on May 25, 1931, two demand notes in favor of the Integrity Trust Company. The collateral depreciated and Alker and a friend DuBan deposited additional collateral with the trust company and entered into certain agreements with the trust company conditioned upon an agreement of forbearance by the Trust Company. The time of forbearance was later extended and a new note given in substitution of the first notes. Alker and DuBan complied in every way with their part of the agreement. The Trust Company closed on January 15, 1940. A day or two before the Trust Company closed the Federal Deposit Insurance claims it made a loan to the Trust Company then open. Large loans had previously been made to it by various Philadelphia national banks and Pennsylvania state trust companies. The Federal Deposit Insurance Corporation claims it took over as collateral for the benefit of itself and the said other banks and trust companies certain notes owned by the Integrity Trust Company with the accompanying collateral, including the said Alker note and the collateral accompanying it. The Federal Deposit Insurance Corporation before the time of deferment had elapsed, when there was no default, notwithstanding the agreement, which it had recognized for almost three years, called the loan, sold a large part of the collateral to itself (a large part of it for $1. per the lot of securities) and brought this equitable action to establish a deficiency and force the transfer to it of certain collateral which DuBan had delivered to the Integrity Trust Company on the strength of the agreement of deferment, the transfer office of which was familiar with the agreement and because it had information that there was no default it had refused to transfer the stock to the respondent. The District Court found in favor of the plaintiff on the ground that the agreement was too indefinite as to time (this although evidence which would have definitely fixed the time was offered and had been refused) *but found specifically that there was no*

fraud. An appeal was taken to the U. S. Court of Appeals for the Third Circuit, which affirmed the finding of the District Court, *basing its opinion, however, solely on the fact that the agreement was a secret agreement and came within the rule of D'Oench, Duhme Co. v. Federal Deposit Insurance Corporation, 315 U. S. 447, and not passing on the other questions involved.* An appeal was taken to your Honorable Court, which refused a certiorari, 334 U. S. 827.

Shortly after this John Pellini, Jr., who had been in the United States Army and overseas in actual combat duty for three years, returned to Philadelphia. He had been Alker's office manager and confidential clerk, handling many of the details relating to the loan. The petitioners also learned of a Mr. Matzinger, a former State Banking Examiner, who had examined the affairs of the Integrity Trust Company for several years prior to the closing. The petitioners at the trial and at the time of filing the petition for certiorari did not know his name, his whereabouts or even that there had been such a person. Then after John Pellini returned, the original notes duly endorsed with a notation of the agreement were found.

Depositions of these witnesses were taken as well as others.

About this time there was a public announcement in the newspapers that sufficient funds had been realized from the assets of the closed bank so that all the local banks and trust companies which had made loans to the closed trust company had been repaid, and enough funds had remained for a long time to repay also the Federal Deposit Insurance Corporation in full, if it had not already done so.

In that event the entire matter would revert to the State Receiver of the Integrity Trust Company, who could not avail itself of the defense raised by the Federal Deposit Insurance Corporation.

A motion was then made in the District Court for a new trial based on the above after-discovered evidence as well as the previous reasons given.

In view of the fact that the United States Court of Appeals had based its opinion entirely on the *D'Oench, Duhme* decision and not on any error of the District Court, the Trial Judge in the District Court felt that an application should be made to the United States Court of Appeals for leave to the District Court to reconsider the motion for new trial.

Application was so made.

The United States Circuit Court considered the same and dismissed the petition—163 Fed. (2d) 123.

Application for reconsideration was presented and again refused—164 Fed. (2d) 469.

A motion for reconsideration of the application was presented and leave to file the same was refused; no reason being given.

This appeal was then taken.

In the meantime a Bill, a copy of which is hereto attached and made part hereof, was introduced in the 81st Congress by the Hon. Francis E. Walters and referred to the House Committee on Finance and Banking where hearings are now being held or about to be held. Bills had been introduced in the latter days of the 80th Congress by Senator Edward Martin and Representative Samuel McConnel and referred to the Banking Committees. Action on the bills was blocked by the Housing and other bills. These bills were in line with the suggestions of Justice Jackson and Justice Black, whose articles appeared in recent numbers of the American Bar Association Journal, suggesting that application should be made to the Legislature to clarify acts of Congress where there is doubt and the burden of clarifying the same not put upon the Courts.

ARGUMENT.

I. Did Not the United States Court of Appeals Err in Refusing Permission to Petitioners for Leave to File With It the Petition for Reconsideration of Petitioners' Motion for Leave to the United States District Court to Hear Their Motion for a New Trial?

This is an equitable action instituted by the petitioners. There had been a decision against petitioners. John Pellini, an important witness, was overseas in the U. S. Army and in actual combat service at the time of the trial. He returned in 1946. Upon his return he appeared and made a deposition clarifying many doubtful points in the matter and testified that he saw the original notes and the renewal note in the possession of the bank at one and the same time; that he personally knew they were in the possession of the trust company for at least six weeks—how much longer he could not tell, because he had no access to the records of the bank; that he knew that the bank examiner was there when both sets of notes were there; that the original notes bore a reference to the agreement involved in this action and the renewal note bore a reference to a continuance of the said agreement on the new note.

The Federal Deposit Insurance Corporation relied upon the alleged fact that the bank records bore no reference to the agreement and the Federal Deposit Insurance Corporation had no notice of the agreement. The above after-discovered evidence answered that.

Also after the trial a former state bank examiner, C. B. Matzinger, who was unknown to exist at the itme of the trial, was located. He appeared and gave deposition that the bank authorities had discussed the agreement with the examiners for three consecutive years before the closing of the bank and the taking over by the Federal Deposit Insurance Corporation. Testimony already appeared that the Federal Deposit Insurance Corporation relied on the

examiners as their agents. Knowledge on the part of the examiners was knowledge on the part of the F. D. I. C.

These depositions should be sufficient to convince any court that the agreement involved in this proceeding was under no circumstances a secret agreement within the meaning of the *D'Oench, Duhme* decision and therefore the United States Court of Appeals should have permitted the filing of the petition and granted permission to the District Court to hear the motion and consider the depositions so submitted.

To refuse the same was a gross miscarriage of justice.

The record shows that at the time of the trial the petitioner Alker was an ill man and not physically fit to appear in the matter. Furthermore, John Pellini's absence in combat duty was an excuse for his not being present at the trial and for the failure to reach him and take his depositions as that was physically impossible. The fact that the existence of Mr. Matzinger, the bank examiner, was not known at the time of trial was also an excuse for his not being present at the trial.

II. The Facts Here Being Complicated and Substantial After-Discovered Evidence Having Been Brought to the Attention of Circuit Court, Did the United States Court of Appeals Deny the Petitioners Due Process of Law in Refusing to Direct the Trial Court to Give a Full Hearing on the After-Discovered Evidence?

Apparently the Circuit Court of Appeals relied upon the majority opinion in *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238, for its method of acting upon this petition. *In doing so, the Court failed to distinguish between the Hartford case (supra) and this case.* In the *Hartford* case (*supra*) it was alleged that fraud had been perpetrated on the Circuit Court itself. Because of this allegation and the fact that it was not alleged that the fraud was perpetrated on the District Court, the Circuit Court retried the case itself. *It was because of this feature alone that the Su-*

preme Court in its 5-4 opinion sustained the Circuit Court, although the minority wrote a very strong opinion disapproving of this procedure.

In the present case the District Court specifically found there was no fraud of any kind.

There was therefore no justification for a hearing on the merits by the Circuit Court, as no fraud was practiced on the Circuit Court, but on the contrary under the law and all decisions other than the Hartford decision (supra) (which as heretofore stated stood on its own facts because of the fraud on the Circuit Court) the motion should have been granted and the District Court directed to entertain the motion for new trial and consider all the after-discovered evidence.

A hearing by the District Court would have enabled petitioners to have had a full opportunity to present the testimony in open Court subject to cross-examination. In only this way would the evidence be gotten before the proper Court for its full consideration. *Simmons Co. v. Grier Bros. Co.*, 258 U. S. 82; *National Brake & Electric Co. v. Christensen*, 254 U. S. 426, 65 L. E. 341.

The procedure as followed by the Circuit Court amounted to a denial of the petitioners of due process of law because they were not given an opportunity to have the after-discovered evidence fully presented to and passed upon by the proper tribunal. *The essential elements of due process of law are notice and an opportunity to be heard. Boone v. Wachovia Bank and Trust Company*, 163 Fed. Rep. 2nd 809, 816. The latter opportunity was denied to the petitioners by the Circuit Court's action. The application before the Circuit Court was in the nature of a pro forma motion, not a hearing on the merits of the case.

III. Did Not the United States Court of Appeals Err in Reaffirming Its Opinion That the Matter was Still Controlled by the Decision in D'Oench, Duhme Co. v. F. D. I. C., 315 U. S. 447, Without Affording the Petitioners a Full Opportunity to Present to the Court of Original Jurisdiction All of the After-Discovered Evidence, Where Such Evidence Indicated That the Records of the Bank Had Disclosed That There Was an Agreement as Contended by the Defendants, the United States Court of Appeals' Decision Being Based on the Theory That There Was No Such Evidence?

While in the case of *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238, it was held by the majority opinion that the Circuit Court in that case was justified in hearing the case because fraud existed, and that fraud was perpetrated upon that very Circuit Court, the minority opinion written by Justice Roberts expresses the general rule as to all but such exceptional cases in which there was fraud, of which the *Alker* case is not one (The District Court having found there was no fraud).

Justice Roberts in the case of *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238, 271, well said:

> "On the question what amounts to a sufficient showing to move an appellate court to grant leave to file an appeal of review in the trial court, the authorities are not uniform. Where the lack of merit is obvious, appellate courts have refused leave but where the facts are complicated, it is often the better course to grant leave to allow available defenses to be made in answer to the appeal. In the present instance I think it would have been proper for the Court to permit the filing of the appeal in the District Court where the rights of the parties to summon, to examine, and to cross-examine witnesses, and to have a deliberate and orderly trial of the issues according to the established standards would be preserved."

The case now before the Court was an equitable action by the Federal Deposit Insurance Corporation to collect on a note as to which there was an agreement that was beneficial to the bank. At the time of the original trial the Circuit Court went on the theory that no evidence had been produced showing that the records of the bank contained a reference to the agreement. The Federal Deposit Insurance Corporation contended it was not bound by the agreement, the agreement being against public policy. (The case was tried on the theory that the Federal Deposit Insurance Corporation had loaned the Integrity Trust Company certain moneys and taken over for its own benefit various assets of the bank, including the note and collateral in question). *As hereinafter stated, any such action on its part was beyond its authority; it being limited to the powers conferred on it by the act creating it.*

After the trial of the case, the appeal, and the return of the case to the Circuit Court, John Pellini, former office manager and employee of Alker returned from the Army, having been overseas in actual combat service at the time of the trial and not available. He was thoroughly familiar with the whole transaction and on his return made a deposition that the bank officials had advised him of the agreement and that it had been extended for ten years from 1936. He was also familiar with the form of the notes and when the first note was returned to Alker. After the discovery of the notes an offer was made to take his deposition to the effect that in December, 1936, the new note was delivered to the Integrity Trust Company and it was not until more than six weeks thereafter that the original two notes were returned to Alker; thus proving that the old notes with the endorsements thereon were in the possession of the bank for at least that period of time. He also offered to prove that the new note of 1936 was given because the Bank Examiner who was then examining the bank had requested the same; that the new note was given while the examiner was there, and the old notes and the new

note were there while the examiner was there and examined by him.

This is important because the record shows that the Federal Deposit Insurance Corporation relied entirely upon the examiners as its agents for its information.

The old notes were found after Pellini returned, having been lost, and on these old notes were endorsements as follows:

"For addtl. collateral and agreement with Mr. Alker and A. A. DuBan
see W. K. H."

"For addtl. collateral and agreement with Alker and A. A. DuBan
see other note and W. K. H."

(The initials "W. K. H." in both endorsements refer to Walter K. Hardt, who had been the President of the Integrity Trust Company.)

John Pellini offered to testify that these endorsements were on said notes when the notes were returned to Alker by the bank.

Only recently, as heretofore stated, C. B. Matzinger, who was a former Bank Examiner was discovered at Easton, Pa., who had examined the Integrity Trust Company for the State Banking Department for several consecutive years prior to the closing. He, his name and whereabouts were unknown to petitioners at the time of the trial, and he was only located by accident. He appeared and offered a deposition that the Integrity officials had advised the Examiners about the agreement relating to the Alker note and advised the Examiners why they had made the agreement. He subsequently on reflection offered to appear again and offer more detailed valuable testimony if the Court would permit it.

It was further learned after the trial of the case by a public announcement by the Federal Deposit Insurance Corporation that the Federal Deposit Insurance Corpora-

tion did not hold the note and collateral for its own benefit but for the benefit of itself and various other banks and state trust companies which had loaned the Integrity money and were familiar with and had ratified the agreement; that the Federal Deposit Insurance Corporation was merely a liquidator for all of them and therefore not an innocent holder for value. This fact was not known until the Federal Deposit Insurance Corporation disclosed it in public print. No statement as to it was made by the Federal Deposit Insurance Corporation at the trial of the case. The testimony shows that the other banks and state trust companies had representatives on the Board of Directors and Executive Committee of the Integrity Trust Company, and one of their number, Mr. Gest, who acted as the dean of the representatives of those banks, had discussed and approved the agreement a number of times. The F. D. I. C., being an alleged partner of the banks and trust companies, was bound by their knowledge.

The Federal Deposit Insurance Corporation announced in the public print that it has paid itself in full its loan or had more than sufficient in hand to pay itself in full. This being the case it has and has had for a considerable period of time no further interest in this matter. This matter, therefore, would revert or should have reverted to the Secretary of Banking, Receiver in Charge of the Integrity Trust Company. The Integrity Trust Company was a party to the Alker-DuBan agreement; it approved of it, and it benefited by it. It has never repudiated it. It therefore would have no defense. Petitioners desire to present these facts. Had the case been remitted by the Circuit Court for a hearing and determination this would all have been developed.

The action being an equitable one, if these facts were proven, the Trial Judge could not find other than for the petitioners, and would have set aside the sale and reinstated the parties to the position in which they were immediately before the sale.

The Circuit Court in dismissing the motion reiterated its opinion that this case was controlled by the *D'Oench, Duhme* case, to wit: that reference to the agreement did not appear on the records of the bank for sufficient time and that the Federal Deposit Insurance Corporation was not bound by it, it being against public policy—all of this despite the fact that there was a finding that there was no fraud connected with it; and despite the fact that testimony was now offered or proposed to be offered that the record of the bank for at least six weeks showed the agreement; that the Bank Examiner was there at the time and saw the old notes and the new note with their respective endorsements; that the Bank Examiner was the agent of the Federal Deposit Insurance Corporation in the matter; and that testimony of a Bank Examiner was further offered not only that the very nature of the collateral itself, the assigned fees, and insurance policies, was, without more notice of the agreement, but the officials of the bank had advised the Examiners of the agreement for at least in three consecutive years immediately prior to the closing.

IV. Did United States Court of Appeals Give Proper Consideration to or Fully Comprehend the Evidence Submitted?

That the Circuit Court did not give proper consideration to, or fully comprehend the evidence which defendants offered in support of their petition, is shown by the many misstatements by the Court and inaccuracies in its opinion in 164 Fed. 2nd 469, some of which are as follows:

Alker did not contend, as alleged by the Circuit Court in 164 F. 2nd, 469, 470, "the legends quoted were typed by the Trust Company on the two original notes at or about the time when the new consolidated note, dated December 11, 1936, was delivered to him by the Trust Company." On the contrary Alker contended (1) the legends were placed on the original notes by the trust company—itself—*just*

when he did *not* know; (2) they were there when the new consolidated note dated December 11, 1936, was requested and given—because the representative of the bank said he was protecting Alker on the agreement by the endorsement on the new note in accordance with endorsements on the first notes. The endorsements were there when the old notes were returned to Alker. Alker did not contend the notes with the legends on them were in the bank records *six days.* Alker contended, on the contrary, they were there, so far as he knew, at least six weeks—how much longer he did not know because they were in the possession of the bank to which he had no access. A period of at least six weeks elapsed, according to Alker and Pellini between the time the new note was given and the return of the old notes to Alker. How long the endorsements were on the original notes beyond the six weeks the petitioners would not know as the notes were, as heretofore stated, in the exclusive possession of the bank.

The Circuit Court says erroneously that "the petitioners make no claim to the contrary that after the original notes were returned to Alker *on or about December 11, 1936* (*the evidence offered was that they were not returned until the latter part of January, 1937*), the trust company had no record of the legends." On the contrary Alker offered to prove that the bank representative inserted on the *new* note on or about December 11, 1936, a legend carrying forward the legends which then appeared on the original notes. This certainly proves that there was among the bank records a record of the legends and agreement, and the Court was in error in that respect. The petitioners should be permitted to introduce this evidence as it goes to the very heart of the case.

An examination of the new testimony offered shows the Circuit Court was in error when it found "More than four years later" (after December 11, 1936) "the Trust Company assigned the consolidated note and the collateral

with all its other banking assets, with certain immaterial exceptions, *as security for a loan of about $20,000,000. made to it by the F. D. I. C. on the usual terms."*

Because the after-discovered evidence offered by Alker shows that the Federal Deposit Insurance Corporation recently announced that the collateral assigned was for the benefit not of itself alone but for the benefit of itself and certain banks and *state trust companies* (who had advanced cash to the trust company and who had knowledge of the agreement as heretofore stated.

The record shows they had representatives on the Trust Company Board and had approved the agreement. The F. D. I. C. was really a partner with them and bound by their acts. It is submitted proper consideration was not given to this.

The petitioners desire to call attention to the fact that Justice Jackson's and Justice Black's articles in the American Bar Association Journals in recent issues substantially stated that application in this kind of case should be made to the Legislature to clarify the Act and that application was so pending and that many members of Congress had advised the petitioners that they believed the law was as the petitioners contend and not as the U. S. Court of Appeals found. It was important that this should be brought to the attention of the Court, because the U. S. Court of Appeals did not give proper consideration to it. The petitioners desire also to bring to the Court's attention the fact that the Integrity Trust Company at the time the alleged loan was made was an open company, that the powers of the Federal Deposit Insurance Corporation to make loans was limited to those conferred upon it by the Act and an examination of the Act shows that no such power was conferred upon the Federal Deposit Insurance Corporation and therefore its action was beyond its power and void. The exact nature of the transaction did not fully appear

until long after the trial. The U. S. Court of Appeals refusal of permission to file the petition for reconsideration clearly showed the Court did not clearly comprehend these facts.

V. Did Not the Federal Deposit Insurance Corporation Exceed Its Authority in Making a Loan to the Integrity Trust Company, Which at the Time Was a Going Concern?

The Federal Deposit Insurance Corporation has no powers other than those especially conferred by the Act creating it.

Therefore the Federal Deposit Insurance Corporation exceeded its authority in making a loan to the Integrity Trust Company. The Integrity Trust Company was an open bank. It only had the power to make a loan to the Integrity Trust Company when the conditions existed as set forth in the Act. It was limited by the Act to the following:

> "(1) If in the judgment of the Board of Directors such action would reduce the risk or avert . . . loss to the corporation **and** will facilitate a merger or consolidation of an insured bank with another insured bank.
>
> (No such situation existed here)
>
> or
>
> Will facilitate *the sale of the assets of an open or closed* insured bank **and** *assumption of its liabilities by another insured bank*
>
> (No such situation existed here)
>
> the Corporation may upon such terms and conditions as it may determine, make loans secured in whole or in part of assets of an open or closed insured bank. . . ."

The above clearly shows it exceeded its authority, and the Court erred in refusing testimony to this effect.

VI. Should the F. D. I. C. in an Equitable Action Be Permitted to Take Advantage of Its Own Carelessness and Failure to Use Proper Business Methods Where the Petitioners Were No Party to It?

The petitioners desired to call the Court's attention to the fact that the F. D. I. C. failed to take from the borrower a declaration of no defense or no set off. Good practice and good business required this. To have done so would have brought the information as to the agreement. This evidence was therefore important as the petitioners who had no knowledge that the F. D. I. C. was acquiring the note and collateral were not parties to the failure on the part of the F. D. I. C. so to do, and the petitioners should not be penalized for the F. D. I. C.'s failure in that respect. The F. D. I. C. should be penalized for its carelessness and neglect—particularly in an equitable proceeding which it itself instituted in the equitable side of the Court. One can scarcely say its hands were clean.

VII. Did the Court Not Err in Failing to Consider the Fact That to Permit the Decision to Stand Opened the Way for Possible Frauds to Which a Governmental Agency Would Be a Party?

The petitioners desired to bring to the attention of the Court that if the Court's decision is permitted to stand, it opens the way for possible frauds to which a governmental agency would be a party. All an insured bank which has a demand note with a valid oral agreement has to do is turn it over to the F. D. I. C., the F. D. I. C. disclaim the agreement, sell the collateral, get a deficiency judgment against the maker, and then turn it back to the insured bank or its receiver, who would then have a valid judgment, which it could not have secured itself because of the agreement that was binding on it but not binding, because of this decision, on the F. D. I. C. Is this fair? Is this right? The Court by refusing the filing of the petition prevented the

petitioners from presenting this to it. Will the Supreme Court permit such a condition to exist? It should not—especially when, if allowed to stand, it will have been brought about by a *Court of Equity.*

VIII. Should the Court Not Have Deferred Acting Until Congress Had Full Opportunity to Clarify the Act, Knowing as It Did That an Act Was Before the Senate and House Banking Committees?

The matter was laid before various members of the Senate and the House on the theory that any relief should be by clarifying the Act. This was in accord with the view of Mr. Justice Jackson and of Mr. Justice Black as set forth in recent issues of the "American Bar Association Journal," and articles which appeared in the New York Times on Oct. 14, 1948, along this line and in various newspapers and magazines throughout the country, the Circuit Court failed to consider these articles or acts.

The Acts submitted to the 80th Congress having been tied up by the Housing and other bills, a new Bill has been introduced in the 81st Congress by Congressman Francis E. Walters and the same is now before the House Banking Committee for (a copy of said Bill is hereto attached and made part hereof) the very purpose of clarifying the situation and following the suggestion of Justice Jackson and Justice Black which, while unofficial, clearly express their views. A canvass of many members of Congress by your petitioners developed that every one interviewed believed the law to be already as this amendment provides.

Your petitioners desired to bring these facts to the attention of the Circuit Court as will appear in the record. By refusing to permit your petitioners to file their petition for reconsideration the Court of Appeals deprived your petitioners of their right to present the same.

It is submitted that if Congress is acting, then it should be given full opportunity so to do, and the rights of the parties in any proceeding pending should not be affected by any act of any Court in the meantime. Congress has shown its intention to respond to the utterances of Justice Jackson and Justice Black, and should be given reasonable time to carry out the same.

CONCLUSION.

For the foregoing reasons the petitioners claim:

(1) That they have been deprived of due process of law;

(2) That the U. S. Circuit Court should have permitted the petitioners to file their petition;

(3) The evidence offered shows the records of the bank did show the agreement and the bank examiners saw the same and were advised of the agreement by the bank officials for three consecutive years before the bank closed or the examination was made, and the case was therefore not controlled by the D'Oench, Duhme case;

(4) The U. S. Circuit Court should have granted leave to the District Court to hear the motion, receive the depositions, have a hearing thereon and act thereon.

(5) The proofs offered clearly show the F. D. I. C. did not use good and ordinary business methods in acquiring the note and collateral, and should not be permitted to take advantage of its own carelessness—particularly in an action instituted by it in the equitable side of the Court.

(6) The F. D. I. C. clearly exceeded its authority and therefore acquired no position higher than the insured bank, as to whom the argument was unquestionably good.

(7) The decision should not be allowed to stand because it opens the way to possible frauds to which a governmental agency would be a party.

(8) If this decision is permitted to stand, it will be a gross miscarriage of justice, as the after-discovered evidence offered clearly takes the case out of the D'Oench Duhme case (which was the point relied upon by the Circuit Court) and clearly defines the time of deferment (which was what the trial judge found lacking).

(9) If this decision is permitted to stand, all basic equitable principles will go by the board as the evidence offered clearly shows the F. D. I. C. did not come into this Court with clean hands nor, having sought equity, was it willing to do equity; the agreement between it and the other participating banks and trust companies, whose representatives had approved the agreement, not having been disclosed; by the F. D. I. C. the evidence clearly showing that it had not used due care and ordinary business methods in taking over the note, which care and methods would have caused them to know about the agreement. The said F. D. I. C. attempted to retain all the benefits derived by the bank and it from the agreement and at the same time repudiated it.

(10) By permitting the decision to stand the Court reads into the Act something which does not there appear, as the Act, which specifically limits the powers of the F. D. I. C., gave it no power to make such a loan to an open bank or enter into such a transaction.

(11) If this decision is allowed to stand, the F. D. I. C. will in every case be permitted to repudiate any agreement and at the same time retain all the collateral deposited with the bank by any third party and the maker of the note, in consideration of a binding agreement of which the F. D. I. C. had full notice, as shown by the after-discovered evidence offered. This is not equitable nor is it fair.

(12) Error was committed by the Circuit Court in denying the petitioners' petition for reconsideration of their request for leave to the District Court to hear their motion for new trial at which all of the above would be developed and equity and justice could be done.

(13) The proofs offered were such that the trial judge could not do otherwise than grant a new trial, and by the Circuit's action the petitioners have been deprived of this right.

(14) A petition for certiorari should be allowed in order that equity and justice might be done.

Respectfully submitted,

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81ST CONGRESS
1ST SESSION

H. R. 1949

IN THE HOUSE OF REPRESENTATIVES

JANUARY 27, 1949

Mr. WALTER introduced the following bill; which was referred to the Committee on Banking and Currency

A BILL

To amend section 12B of the Federal Reserve Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) subsection (s) of section 12B of the Federal Reserve Act, as amended (U. S. C., title 12, sec. 264 (s)), is amended by inserting before the period a colon and the following: "*Provided*, That nothing herein shall be construed as prohibiting any bona fide transaction between an insured bank and a customer where there is an absence of fraud, and any claim of the Corporation on any note acquired from an insured bank in any capacity whatsoever shall be subject to all defenses available to such bank under the laws

of the State in which the transaction giving rise to such claim occurred".

(b) The amendment made by this section shall be effective as of August 23, 1935.

SEC. 2. (a) Subsection (y) of section 12B of the Federal Reserve Act, as amended (U. S. C., title 12, sec. 264 (y)), is amended by inserting at the beginning of such subsection "(1)" and adding a new paragraph thereto as follows:

"(2) Notwithstanding any other provision of this section, the relationship with respect to all transactions between the Corporation and an insured bank is that of insurer and insured. Except in cases of actual fraud, all defenses that might be raised against an insured bank may be raised against the Corporation with respect to any obligation or other property acquired by it directly or indirectly from an insured bank irrespective of the form or method the Corporation may adopt to acquire the same, or to assist the insured bank."

(b) The amendment made by this section shall be effective as of August 23, 1935.

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FILED
MAR 29 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 562

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED, *Petitioners,*

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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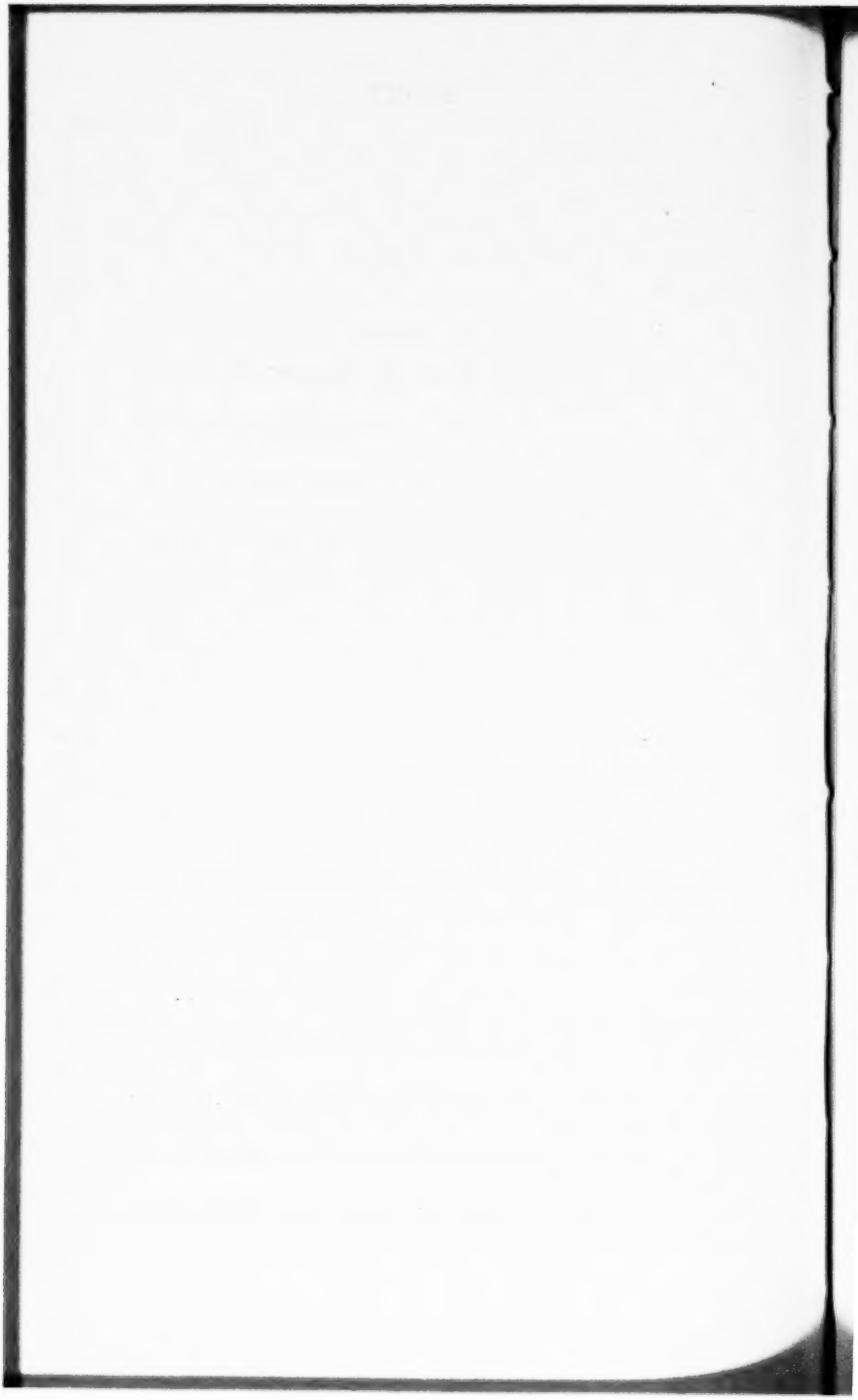

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 562

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED, *Petitioners,*

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR FEDERAL DEPOSIT INSURANCE CORPORATION, RESPONDENT, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Opinions Below and Previous Rulings of This Court

The opinion of the trial court (Record, A * 475a-481a), the United States District Court for the Eastern District of Pennsylvania, is not reported.

---

* The records on the three petitions for certiorari (Oct. Term, 1945, No. 880; Oct. Term, 1947, No. 697, and Oct. Term, 1948, No. 562), are herein designated A, B, and C, respectively).

The opinions of the United States Court of Appeals of the Third Circuit and the rulings of this Court on the two preceding petitions for certiorari, and on the petitions for rehearing thereof, listed in chronological order, are:

151 F. (2d) 907
327 U. S. 799
328 U. S. 877
328 U. S. 879
328 U. S. 881
329 U. S. 823
329 U. S. 830
163 F. (2d) 123
164 F. (2d) 469
334 U. S. 827
334 U. S. 862
169 F. (2d) 336
335 U. S. 838
335 U. S. 864
335 U. S. 894

Jurisdiction

The order sought to be reviewed was entered on November 15, 1948, by the United States Court of Appeals for the Third Circuit (C, 22). The petition for a writ of certiorari was filed on February 14, 1949. Petitioners rely upon Title 28, USC, Sec. 1254 (1). (Petitioners cite the repealed provision in Section 240 (a) of the Judicial Code as amended (Title 28, USC, Sec. 347 (a)).

Question Presented

Whether in the circumstances of this case the United States Court of Appeals correctly refused to permit the reopening of the judgment in this case.

Statement of the Case

More complete statements of the case are contained in our briefs in opposition to the two preceding petitions for certiorari (Oct. Term, 1945, No. 880; Oct. Term, 1947, No. 697). The following statement summarizes the earlier two, and brings them down to date.

The judgment is based on defendant Alker's note indebtedness to Integrity Trust Company (A, 508a).

Substantially all of the assets of the bank (including the Alker note) were assigned in 1940 to Federal Deposit Insurance Corporation (hereinafter abbreviated FDIC) as collateral security for a loan of some twenty million dollars (A,71a, 75a, 80a, 83a).

FDIC called the note, sold the collateral and brought this suit for the deficiency (A, 127a).

The defense was an alleged oral agreement between Alker and the bank not to call the loan or sell the collateral (A, 187a).

The District Court (Welsh, J. without a jury) found that there was no such agreement and entered judgment for plaintiff (A, 479a, 493a).

The United States Court of Appeals affirmed on the ground that such an agreement, not being reflected in any record of the bank, was a secret agreement and on the authority of *D'Oench, Duhme & Co.* v. *FDIC,* 315 U. S. 447, ineffective (151 F. (2d) 907).

This Court refused certiorari, denied two petitions for rehearing and three petitions for leave to file additional petitions for rehearing (327 U. S. 799; 328 U. S. 877, 879, 881; 329 U. S. 823, 830).

The mandate went from the Court of Appeals to the District Court October 24, 1946 (B, 4).

Alker then applied to the District Court for a new trial. The District Court continued the matter pending application to the Court of Appeals for leave to proceed in the District Court (B, 4).

Alker then applied to the Court of Appeals for such leave (B, 1). The Court of Appeals refused it (B, 30) (163 F. (2d) 123).

Alker then applied again for such leave based on different grounds (B, 32). The Court of Appeals again refused (B, 56; 164 F. (2d) 469).

This Court refused certiorari on May 24, 1948, 334 U. S. 827.

Alker then petitioned this Court for a rehearing and applied to the Court of Appeals for a stay of the mandate. Both applications were based on bills pending in Congress (C, 13-15).

This Court denied the petition for rehearing on June 21, 1948 (C, 1-2; 334 U. S. 862).

The Court of Appeals denied the motion to withhold the mandate on July 2, 1948 (C, 2). A motion for rehearing was filed July 7, 1948 (C, 2) and denied July 29, 1948 (C, 4; 169 F. (2d) 336). The mandate went down July 29, 1948 (C, 7).

By this time the loan of FDIC to Integrity Trust Company had been repaid in full, and the remaining assets pledged as security for the loan, including all rights under the Alker judgment, had been assigned to the Secretary of Banking, Commonwealth of Pennsylvania, the Statutory Receiver of Integrity Trust Company (C, 12). On July 28, 1948 FDIC moved the District Court to substitute the Secretary of Banking for it as party plaintiff (C, 11-13).

On August 25, 1948 Alker proceeded in three courts simultaneously, viz.:

In this Court he filed a petition for leave to file a supplement (based on the motion for substitution of party plaintiff) to the petition he had already filed (based on the pending bills in Congress) for leave to file, out of term, a second petition for rehearing (C, 16).

In the Court of Appeals he filed a petition to reconsider his motion for leave to the District Court to hear the motion for a new trial, which was also based on the motion for substitution of party plaintiff (C, 15-18).

In the District Court, without awaiting action on his applications to this Court and to the Court of Appeals,

and notwithstanding the mandate which had gone down to the District Court, he filed a renewal of the motion for a new trial (C. 17).

This Court dismissed the petition to it on October 11, 1948 (335 U. S. 838). The Court of Appeals dismissed the petition to it on October 27, 1948 (C, 18).

Alker renewed his applications to this Court on October 26, 1948, and to the Court of Appeals on November 1, 1948 (C, 19).

The applications were denied by the Court of Appeals on November 3, 1948 (C, 22) and by this Court on November 8, 1948 (335 U. S. 864).

On November 15, 1948 the Court of Appeals made the order (C, 22) which Alker seeks to have reviewed on the present petition for certiorari (Petition, p. 6). On November 9, 1948 Alker had applied for leave to file a "Petition for Reconsideration of Defendants' Motion for Leave to the United States District Court to Hear Motion for New Trial." This application was denied November 15, 1948 (C, 22).

On November 23, 1948 Alker filed in this Court a Petition for leave to file another petition for rehearing the second petition for certiorari. This was denied by this Court on December 13, 1948 (335 U. S. 894).

The present (third) petition for certiorari was filed in this Court February 14, 1949.

On March 3, 1949 the District Court made an order *granting* Alker's motion for a new trial, and denying the motion to substitute the Pennsylvania Secretary of Banking, Receiver of Integrity Trust Company, as party Plaintiff.

On March 16, 1949 FDIC petitioned the Court of Appeals for a writ of mandamus and prohibition, to enforce the mandate, to direct the District Court to vacate the order for a new trial and to prohibit it from proceeding with

a new trial. The Court of Appeals has issued a rule on Judge Welsh and the other judges of the District Court to show cause why the writ should not issue. This writ is returnable April 18, 1949.

Argument

The only action taken by the Court of Appeals within three months of the filing of the petition for certiorari, is its order of November 15, 1948. This order denies leave to file a "Petition for Reconsideration of Defendants' Motion for Leave to the United States District Court to Hear Motion for New Trial" (C, 22). The petition referred to is not attached to the Petition for Certiorari nor printed in the Transcript of Record.

On Alker's earlier petitions for rehearing the Court of Appeals received and denied the petitions. In this instance, it adopted the practice of refusing the application for leave to file the petition. In this practice it followed the precedent of this Court. This Court, on the first petition for certiorari, denied the writ (327 U. S. 799), denied the petition for rehearing (328 U. S. 877), granted leave to file a second petition for rehearing, but denied the petition (328 U. S. 879) and refused leave to file third, fourth and fifth petitions for rehearing (328 U. S. 881; 329 U. S. 823, 830). Likewise on the second petition for certiorari this Court refused the petition (334 U. S. 827), refused the petition for rehearing (334 U. S. 862) and refused leave to file subsequent petitions for rehearing (335 U. S. 838, 864, 894).

The reasons relied upon for allowance of the writ are substantially the same as those heretofore advanced in support of the second petition for certiorari and the numerous petitions for rehearing thereof (October Term, 1947, No. 697). As such they require no further consideration. These reasons are:

The Court of Appeals exceeded its authority when it weighed the after discovered evidence instead of "perfunctorily" referring the matter back to the District Court (Reasons 4 and 6 at page 9 of present petition; and at page 6 of present petition; and in second petition for certiorari (at page 6) and in first (at pages 3 and 4), second (at page 7) and third (at page 10) petitions for rehearing thereof).

The endorsements on the note (Reason 5 at page 9 of present petition; and in second petition for certiorari (at pages 9 and 13) and in first (at pages 4 and 5) and fourth (at page 9) petitions for rehearing thereof).

The bills pending in Congress (Reason 7 at page 9 of present petition; and in first (at page 6), second (at pages 6 and 7), third (at page 12), and fourth (at pages 10, 11, and 13) petitions for rehearing of second petition for certiorari).

The authority of FDIC to make the loan to the bank (Reason 5 at page 9 of present petition; and in third (at page 7) and fourth (at pages 5, 7 and 14) petitions for rehearing of second petition for certiorari).

The failure of FDIC to exact from each of the bank's debtors, a declaration of no set-off before it made the loan to the bank (Reason 9 at page 10 of present petition; and in third (at page 8) and fourth (at pages 7 and 13) petitions for rehearing of second petition for certiorari).

The reassignment of the Alker loan to the Bank's Receiver (Reason 10 at page 10 of present petition; and in third (at pages 11 and 12) and in fourth (at page 12) petitions for rehearing of second petition for certiorari).

The other reasons assigned are frivolous, viz.:

That due process of law has been denied because the Court of Appeals refused to entertain a ninth petition to review matters which had already been before them eight

times and had been decided on their merits (Reasons 1 and 2 at page 8 of present petition).

That the Court of Appeals which had already written four opinions must assign reasons for refusing to entertain a ninth petition (Reason 3 at page 9 of present petition).

We deem it proper to direct the Court's attention to certain serious errors of statement in the petition. The Court of Appeals had found that the evidence concerning the endorsement on the old notes was irrelevant to the rule of the *D'Oench Duhme* case because there was no evidence that these endorsements were on the notes at the time any bank examiner or representative of FDIC was in the bank. Alker now asks that this finding be reviewed and reversed because of the deposition of John Pellini, Jr. Alker cites the deposition of John Pellini, Jr., stating: "His depositions were taken on his return, and transcribed by the court stenographer, to the effect * * * that the old notes, when returned, bore the endorsements as to oral agreements as they now appear * * *" (pages 2 and 3 of petition) and "that he knew of his own knowledge that both sets of notes were at the same time in the possession of the bank for at least six weeks and during that period the bank examiner was there and saw both sets." (page 4 of petition)

These statements are repeated in petitioner's brief at page 17, making three statements in all to the effect that Mr. Pellini had deposed that the bank examiner had seen the notes with these endorsement on them.

There is no such testimony.

Mr. Pellini's deposition was taken on January 16, 1947. It is not printed in the transcript. We do not find it among the records of either the District Court or the Court of Appeals, and there is no entry in the dockets of those courts indicating that it was filed in either of them. We print his deposition in full as an appendix to this brief. It

will be seen that Mr. Pellini was asked no questions about the notes, or their endorsements and gave no testimony about them.

The loan of FDIC to the Integrity Trust Company has been repaid in full. FDIC has reassigned all rights under the Alker judgment to the Receiver of the Trust Company and has no financial stake in it. Nevertheless it is cited once more to answer a contention (which has been before this Court eleven times before) on the basis of testimony which does not exist. How long, we ask, will this litigant continue to abuse the patience of this Court.

Conclusion

We respectfully submit that petitioners again have not demonstrated that the case warrants the allowance of a writ of certiorari and that the petition for a writ, therefore, should be denied.

Respectfully submitted,

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Federal Deposit Insurance Corporation.

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JOHN L. CECIL,
Attorneys for Respondent.

APPENDIX

Deposition taken before Amelia H. Syren, Notary Public, at the office of Montgomery, McCracken, Walker, and Rhoads, Esquires, 1500 Morris Building, Philadelphia, Pennsylvania, on Thursday, January 16, 1947, at 4 o'clock p. m.

JOHN PELLINI, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Alker:

Q. What is your name?

A. John Pellini.

Q. What is your address?

A. My present address is 223 East Main Street, Pennsgrove, New Jersey.

Q. Where were you employed in 1937 or some years before and some years afterwards?

A. From 1934 to 1943 I was employed by Mr. Alker.

Q. In what capacity?

A. Well, I started out as a runner there and I finally wound up as officer manager taking care of the books, paying all bills, and all general office work.

Q. Did you on any occasions go to the Integrity Trust Company in reference to my loan?

A. Yes, sir, I did, on many occasions. Mr. Perrone and I both used to go. If he was busy on something I would go to the Integrity to pay the note, which was every month.

Q. Pay the interest?

A. That is right, sir, pay the interest on that note.

Q. Did you know any of the officers over there?

A. Oh, yes, I knew Mr. Brown, Mr. Winterbottom,—he was up in the real estate department—Mr. Conger, Mr. Semish.

Q. Did you have any conversations with any of those officers about my loan about 1937?

A. Yes, I did, with Mr. Senisk, because he was the man I used take the check to, and he would give it to a clerk to go in and get my receipt, and quite often I would sit and talk

to him, and I can recall a number of times I told him it was quite a heavy load that Mr. Alker was carrying. He said it was, but they had a lot of faith in Mr. Alker for the simple reason he had been paying his interest. He had an insurance policy. He had some sort of collateral against the loan. They had faith in him for the simple reason they knew Mr. Alker would eventually pay it off as soon as the market became better. We used to talk about that because the interest was so large, about $2500 a month plus the insurance I used to pay as collateral on that loan. As I can recall there was one insurance which had been extended from 1936 to 1946 which Mr. Semish had told me about, because I told him we were still paying the premium on it.

He said, "Yes, the insurance policy had been renewed for the simple reason they had agreed to continue the loan of Mr. Alker, to extend it, a continuation for ten more years. That is why they had renewed that policy. I was kind of happy about the whole thing because I knew how hard it was for Mr. Alker at times to get up that $2500 a month.

Q. Did you know the date to which he said the loan was extended?

A. I think that was about 1937. He said it would go to 1946. It would go for ten more years.

Q. Where have you been since February 1, 1943?

A. I have been in the army from about the first week of February up until the end of 1945.

Q. Where were you?

A. I was overseas most of the time.

Q. You just got back in 1945?

A. That is right, sir.

Cross-examination.

By Mr. Olmsted:

Q. Did you say you kept Mr. Alker's books?

A. John Perrone kept most of the books and I helped him on the books. Mr. Perrone left in 1941 and I continued on from there on in.

Q. Were you familiar with the books?

A. I was quite familiar with them.

Q. It was a fact that the dividends that Mr. Alker received from the stocks that were pledged as collateral exceeded the amount of the interest?

A. Not that I know of.

Q. You don't know whether it is so or not?

A. No, I don't because I never for the simple reason—what stocks do you mean? The stocks that were pledged as collateral?

Mr. Olmsted: I would like the record to show that Mr. Alker spoke to this witness in the middle of his answer.

By Mr. Olmsted:

Q. Don't pay any attention to Mr. Alker's statement and listen to me. You said you were office manager at the end and kept the books.

A. Yes, to a certain extent.

Q. Are you familiar with the dividends that were payable to Mr. Alker?

A. No, not all of them, no, sir. I wasn't familiar. At the present I couldn't remember, to be truthful with you, about those dividends.

Q. You don't know then whether or not the dividends that he received were greater or less than the amount of interest that he paid?

A. No, I wouldn't know, sir.

Q. Did you make out his income tax return?

A. No, sir, I didn't. He took care of them himself.

Mr. Olmsted: That is all.